

STATEMENT BY

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ORGANIZATION

HOUSE COMMITTEE ON GOVERNMENT REFORM

REGARDING

THE BUSH ADMINISTRATION'S PROPOSAL FOR CIVIL SERVICE CHANGES

ON

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My name is John Gage, and I am the National President of the American Federation of Government Employees, AFL-CIO (AFGE). On behalf of the more than 600,000 Federal and District of Columbia employees our union represents, I thank you for offering me the opportunity to testify today on the Bush Administration's proposals for government-wide changes to the civil service system. You have entitled today's hearing "Mom, Apple Pie, and Working for America: Accountability and Rewards for the Federal Workforce" and asked me to comment on the proposals contained in the draft version of the Administration's so-called "Working for America Act."

Working "for" America. Mom. Apple Pie. Based upon our union's experience with the Congressional debates over personnel changes in the Departments of Homeland Security and Defense, we certainly hope that the proponents of this legislation do not mean to portray those who might oppose it as working "against" America and in opposition to moms and apple pie. We certainly hope that a reasoned discussion of the merits will take place, and that one's position on "pay for performance" and the destruction of union rights and due process will not be framed as yet another measure of loyalty and patriotism.

The Administration's proposed legislation to force all Executive Branch agencies to adopt pay-for-performance schemes certified by the Office of Personnel Management (OPM) and drastically reduce the rights of federal employees to union representation will not help the Federal government in any way. Indeed, there is no objective, audited data to affirm or even to suggest that pay for performance and the reduction of workers' rights to union representation improve any aspect of either public or private sector organizations. Productivity does not go up with pay for performance. Employee satisfaction does not go up with pay for performance. "Accountability" does not go up with pay for performance. Costs do not go down with pay for performance. Accomplishment of mission does not improve with pay for performance. And prohibiting workers from having union representation also does not improve productivity, employee satisfaction, "accountability," cost control, or accomplishment of mission.

Should Federal employees be forced to compete against their coworkers for a salary adjustment? Should Federal employees have to wonder from year to year whether a supervisor might decide that he or she deserves a pay cut? Should Federal employees be prevented from access to their union's negotiated grievance procedures when they have evidence that a supervisor's evaluation of his performance is inaccurate? Should Federal employees be denied union representation when management speaks to her about problems at the workplace? Should Federal employees be denied the right to have an unfairly imposed penalty overturned after an unbiased third party has decided the penalty was unwarranted just because the agency says overturning the decision would have an impact on the agency? Should Federal employees be forced to work as probationary employees for three full years without any rights on the job at all?

Should Federal employees who work for the federal government be forced to trade a pay system that sets their salaries according to objective factors such as job duties and responsibilities, and adjusts those salaries according to objective market data, for one in which supervisors decide their salaries based on personal assessments of their personal qualities or “competencies”? Should these employees trade salary adjustments based upon data collected by the U.S. Department of Labor’s Bureau of Labor Statistics for so-called market surveys conducted at the discretion of local management by whatever private outfit the manager chooses?

Should Federal employees who vote for union representation and pay union dues be denied the right to collective bargaining on anything except issues management decides are “foreseeable, substantial and significant in terms of impact and duration” including such issues, important to every employee, as work schedules, travel, overtime and access to promotions, career development, and training? Make no mistake about it: this new standard for negotiability will *end* collective bargaining in the Federal government as we know it. The only difference from DHS and DoD is that this time the proponents of this notion will not have the excuse of national security as a pretext to radically reducing workers’ rights.

The consequences of this reduction in meaningful issues for collective bargaining will be worker burnout, increased danger to workers because of unsafe conditions, and adverse impact on morale within work units if assignments and work schedules are not offered or ordered in a fair and consistent manner. This lowering of morale will correspondingly lead to reductions in productivity. And ultimately the inability of the elected employee representatives to resolve these matters through collective bargaining will create recruitment and retention problems for the government, as employees find more stable positions in state and local government, or with the private sector.

The employees AFGE represents want their voices to be heard in the development of any new pay system, especially on fundamental issues such as the classification methods, criteria, and system structure; the way base pay is set and adjusted and the rules of pay administration, including policies and procedures for something as complex as pay for performance. But the Administration’s draft legislation extinguishes the voice of workers who would actually be paid under any new system. There is no provision for any collective bargaining at all with regard to the development of a new system, despite the fact that across-the-board, participants in demonstration projects maintain that the only way such systems have any degree of legitimacy, support, or fairness is if these issues are addressed through collective bargaining and worker protections are written into a fully enforceable collective bargaining agreement.

Should Federal employees be denied the protection of the Douglas factors which have served for 30 years to protect them from being victimized by overly harsh,

unreasonable, or discriminately applied penalties? This proposal would rob employees of the ability to have the Merit Systems Protection Board (MSPB) alter a penalty unless he or she were able to show that the penalty was “totally unwarranted” – a high legal standard no one is likely ever to meet. The Douglas Factors that the MSPB has used to evaluate the fairness of agency-imposed penalties on employees that the Administration would deny to workers are as follows:

1. The nature and seriousness of the offense, and its relation to the employee’s duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2. the employee’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3. the employee’s past disciplinary record;
4. the employee’s past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5. the effect of the offense upon the employee’s ability to perform at a satisfactory level and its effect upon supervisors’ confidence in the employee’s ability to perform assigned duties;
6. consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7. consistency of the penalty with the applicable agency table of penalties; (The Board mused in footnotes that these tables are not to be applied mechanically so that other factors are ignored. A penalty may be excessive in a particular case even if within the range permitted by statute or regulation. A penalty grossly exceeding that provided by an agency’s standard table of penalties may for that reason alone be arbitrary and capricious, even though a table provides only suggested guidelines.)
8. the notoriety of the offense or its impact upon the reputation of the agency;
9. the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10. potential for employee’s rehabilitation;
11. mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad

faith, malice or provocation on the part of others involved in the matter;
and

12. the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

The Administration's bill is not about either rewards or accountability. Indeed, it would eliminate several mechanisms for holding agency managers and political appointees accountable for how they treat the federal workforce, in terms of the way that workforce is selected, retained, disciplined, terminated, managed, and paid. Although the Administration contends that the merit system principles will be upheld if its legislation is enacted, there will be few opportunities for federal employees or others to obtain information to confirm or disprove this. Indeed, the independent organizations with the closest ties to the federal workforce, democratically elected unions, will be denied access to information necessary to process grievances. For example, the legislation denies the union's existing right to information if such information is not normally maintained or "reasonably available." These exceptions are, obviously, large enough to hide evidence of mismanagement and fraud, and are certainly large enough to hide evidence of breaches in the merit system principles.

The Working for America Act

The Administration's proposed legislation would require the establishment of entirely new classification systems and pay systems. Performance "ratings of record," which would include evaluation of an employee with regard to both "performance requirements" and "performance expectations," would be used for all purposes under Title 5 that mention them. "Performance requirements" are defined in the draft as "broadly defined duties, responsibilities, competencies, or other contributions that an employee must demonstrate on the job" and have to "support and align with agency mission and strategic goals, organizational program and policy objectives, annual performance plans, and other measure of performance" and have to be communicated to the employee in writing. In contrast, "performance expectations" are "more specific and include the particular contributions (and applicable measures) that an employee's supervisor expects from him/her as s/he carries out specific assignments" and "need not be conveyed in writing." "Performance expectations" can include "goals or objectives set at the individual, team, or organizational level" and can take any form. Also, "the means of communicating performance expectations" are at the "sole and exclusive discretion of management."

I want to call the committee's particular attention to this: "Performance expectations" need not be conveyed in writing, can be set at either the individual, team or organization level, and can take any form. So these "performance expectations" can, in the Administration's plan, be as important as market data, and fulfillment of expectations or requirements that are both individualized and

put in writing in determining an individual employee's base pay, pay adjustment, and job security. There is no way for an employee or a union or any judicial body to hold an agency accountable for legal authority as broad and vague as this.

The supervisor's evaluation of performance – relative to requirements and expectations-- will be the basis for pay, any awards provided under any agency awards programs, and promotions. Although the performance ratings could be grieved through either a negotiated or administrative grievance procedure, arbitrators would not be able to conduct independent evaluations of performance in order to ascertain whether the rating were accurate.

The legislation allows absolutely no collective bargaining with respect to the design or implementation of a pay for performance system. The new pay systems designed solely by agency management will need to be submitted to OPM for "certification," although there is a "meet and confer session" and the proposed systems do need to be published in the Federal Register prior to a 30-day comment period. The capacity of OPM to provide effective oversight or a meaningful certification process is highly questionable. Like FEMA, OPM has become highly politicized in the last five years and has seen an exodus of many highly qualified career professionals. It is almost certain that OPM would, following Administration preference, contract out this work and yet another inherently governmental function that is "intimately related to the public interest" would fall into the hands of private consultants.

The outline proposed in the Bush Administration's plan would, for the first five years a pay for performance system is in existence, fund the "pay pool" for performance adjustments at a level that is equivalent to what the agency would have spent on within grade increases and other step increases. After those five years, however, all bets would be off.

I testified last week before the Senate Homeland Security and Governmental Affairs Subcommittee on Oversight of Government Management and the Federal Workforce and the District of Columbia about successful demonstration projects involving alternative personnel systems. All the examples of success discussed at the hearing provide across-the-board salary increases and receive funding that exceeds that which would have been spent on General Schedule adjustments, both in order to fund the performance payments themselves as well as to cover the additional administrative expenses that a pay for performance system requires. This supplemental funding is absolutely critical to ensure that pay for performance schemes do not become methods to either reduce the payroll, or to reallocate it away from bargaining unit members and into the pockets of managers and high level professionals.

In the President's proposed government-wide legislation, local market supplements can be paid on top of "pay pool" performance increases to those with at least fully successful ratings. OPM would be given the authority to

decide whether to adjust the bands. *Only in the event that OPM decided to adjust the rates at the very bottom of a band would every worker with a successful appraisal receive a raise.* But there would be no parity or uniformity even within a locality. Instead, OPM could exercise its discretion to “provide different adjustments for different bands and may adjust band minimum and maximum rates by different percentages.”

That is, OPM could take the money that under the General Schedule would be allocated equitably across the federal workforce and decide to forgo any raises at all for so-called unskilled work such as military equipment repair or serving meals to veterans, decide to allow miniscule raises for those who process Social Security benefit applications, and lavish big raises on folks in the highest grades charged with carrying out the President’s Management Agenda.

The discretion is immense: OPM can decide that these local market supplements apply only to specific occupations and these can vary in size by band, occupation, and location. When OPM decides whether and by how much to adjust bands, it can consider “mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other agencies, and any other relevant factors.” There is nothing in the bill describing what kind of data OPM has to use to justify its actions; OPM has complete discretion.

The draft legislation also authorizes relaxation of standards and procedures with regard to competitive service appointments. It allows agencies to set probationary periods of up to three years. It amends the definition of “grievance” to include “any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation ...if it was issued for the purpose of affecting conditions of employment...including misinterpretation, or misapplication regarding an employee’s pay, except those that involve the exercise of a manager’s discretion.”

The bill changes the authority of the FLRA to issue “status quo ante” remedies. Even if an agency is found to have committed an unfair labor practice, if the remedy “would adversely impact the agency’s or activity’s mission or budget or the public interest” the remedy cannot be ordered. Also, a bargaining unit employee would lose the right to have a union representative present when a manager “reiterates” an existing personnel policy practice or working condition, when the meeting “is incidental or otherwise peripheral to the announced purpose of the meeting” or the meeting doesn’t result in the announcement of any change. Further, it only allows union representation at grievances filed under negotiated grievance procedures, not administrative grievance procedures. It also restricts the release of information to unions. Finally, the bill only requires an agency to bargain over changes that will affect members of the bargaining unit in ways that are “foreseeable, substantial, and significant in terms of both impact and duration.”

With regard to grievances over “ratings of record,” arbitrators would only be able to order changes if they can determine what the rating would have been if not for the violation of law, agency rule or regulation, or provision of a collective bargaining agreement. Finally, the draft bill proposes that penalties imposed on employees under chapter 75 (adverse actions) cannot be changed unless they are found to be “totally unwarranted” in light of “all the relevant factors.”

The civil service that would exist if the Administration’s bill were enacted would be relatively lawless. It is not just that a statutory pay system would be replaced by schemes governed by regulation and OPM certification. It is that the federal workplace would no longer be governed by a legal framework that effectively prohibits favoritism. All the key decisions affecting the composition of the federal workforce – who is hired, who is fired, who is assigned to what work – will be made without reference to a solid legal foundation that assures the public that these decisions will be apolitical. All the key decisions affecting the terms of employment for the federal workforce – classification, pay, discipline, access to information, union representation in the context of management communications to workers with regard to issues that affect one’s assignments, schedules, eligibility for either pay raises or reductions; will be altered in favor of unilateral managerial discretion.

These profound changes in the very nature of the civil service are dangerous. The rule of law is necessary for a politically independent civil service, and the Working for America Act substitutes the rule of law for the rule of men in far too many instances. Its restrictions on collective bargaining over any aspect of pay and performance management will effectively prevent workers from holding agency management accountable to Congress and the public. Its OPM-certified pay for performance systems will not only allocate appropriated funds in ways that will not be transparent to the public or the Congress, they will also spend inordinate amounts of scarce resources on the complex administrative procedures inherent in all individualized pay systems.

Scholarly Analysis of Pay for Performance: What do the Data Show?

The only truly objective academic survey and analysis of the appropriateness and effectiveness of pay for performance in the federal sector has been conducted by Iris Bohnet and Susan Eaton of Harvard’s Kennedy School of government. Their work is apolitical, and is based on empirical data of outcomes in the private and public sectors rather than projections or anecdotes from those with a material or political interest in carrying out a particular agenda.

Professors Bohnet and Eaton have identified through their research “conditions for success” for pay for performance in the public sector generally, and the federal sector in particular. They describe their work as providing a “framework” for determining whether and in what circumstances it makes sense to make

“incentive pay” a percentage of salaries in the pay system for federal workers. Their analysis combines economics, human resource management, and social psychology in both theory and practice.

Bohnet and Eaton start out by defining pay for performance as a system that ties pay to output “in a proportional way, so that the more output, the higher the pay” and connect this approach to the views of Frederick Taylor, first published in 1911, who argued that workers had to be “motivated to do their jobs more efficiently” by external factors. It is instructive to recognize that although advocates of the Bush Administration’s legislation repeatedly describe their approach as a modernization, it would in fact take us back about 100 years with regard to an understanding of “performance management.”

Bohnet and Eaton note that the best empirical studies of performance pay use “simple jobs” where measuring performance is straightforward. Even then, however, the analysis of the success of pay for performance becomes ambiguous because of the trade-off between quality and quantity. Their survey of this research shows that while workers whose jobs require just one, discrete task, such as replacing windshields, have been shown to improve output in response to the pay incentives, when just one more factor – quality—is added to the equation, the conclusions become unclear. That is, if you only look at quantity, workers can be expected to produce more if they are paid more for higher output. But if quality is considered, the overall benefit to the enterprise is less clear.

Inherent Difficulties in Measuring Individuals’ Credit for Improvements to Output

The three primary “conditions of success” identified by Bohnet and Eaton depend upon “the kind of output produced, the people producing the output, and the organizational setting in which the people produce the output.” Their conclusion is that the “conditions for success are generally not met by empirical reality in the private sector—and even less so by the empirical reality in the public sector.”

The first “condition of success” is that output should consist of a single task that is clearly measurable and linked to a single individual. As everyone knows, the vast majority of federal employees is charged with completing multiple tasks only a small fraction of which is clearly measurable or susceptible to linkage to the work of a single individual. Bohnet and Eaton use the example of workers at the Occupational Safety and Health Administration who, under a pay for performance scheme that attempted to measure output, would have a strong incentive to focus on workplace safety rather than workplace health concerns because preventing an injury, e.g. falls from a platform, is far more measurable and linkable to the work of an individual agent, than is preventing a disease from developing 15 years into the future. Is preventing falls more valuable to OSHA than preventing cancer by limiting exposure to carcinogens? Would focusing

more on preventing injury than on preventing illness improve OSHA's performance as an agency?

Linking increases in output, performance, productivity, or contribution to mission to individuals would seem to be an uncontroversial prerequisite to implementation of an individualized pay for performance scheme. However, Bohnet and Eaton describe the near impossibility of achieving this in the context of some federal agencies' missions such as the State Department's responsibility to "promote the long-range security and well-being of the United States." It is in this context that they cite the fact that although more and more work in the federal and non-federal sectors is performed by teams of employees, even team awards can create perverse incentives to be a "free rider" and enjoy the benefits of other people's efforts.

Perhaps this is why the Department of Homeland Security (DHS) has fallen back on the truly irrational and subjective use of pay for personal "competencies" rather than pay for performance, even though their system pretends to be a pay for performance system. Paying according to personal attributes such as ability to learn, lead, and conduct oneself in a pleasant and professional manner is an obvious recipe for favoritism and corruption in the context of a federal agency. While no private business would survive the rigors of competition in the market if it paid employees according to such ephemera, a federal agency could get away with such a corruption of the public trust indefinitely, at least until someone blew the whistle or some type of disaster exposed the effect of this type of mismanagement.

Misunderstanding Federal Employees' Motivation to Perform Can Produce Negative Results

With regard to Bohnet and Eaton's second "condition for success," the question is whether pay for performance motivates federal employees. Their literature review focuses on the fact that federal employees have been found to be "much less likely than employees in business to value money over other goals in work and life." They cite the work of numerous psychologists and economists that suggest that "performance pay can even decrease performance if it negatively affects employees' intrinsic (inner-based) motivation." They discuss so-called "public service motivation" which was found in a 1999 study of federal employees to be the primary source of high performance.

Another aspect of the "people factor" in evaluating the potential impact of pay for performance is the unpredictable way people may react to changes in their pay. Bohnet and Eaton discuss the differences in attitude toward "absolute" and "relative" pay. Research shows that wage cuts of a particular amount cause more harm than the positive effects of wage increases of the same amount. In other words, especially in zero-sum pay for performance schemes where one

worker's gain is another's loss, the impact from the loss outweighs the impact of the gain for the enterprise as a whole.

Regarding the question of relative pay, these scholars argue as follows:

Comparisons with similar others, or "social comparisons," are a second reason why performance pay may not work; they involve considerations of both procedural and distributive justice. This simply means that for a pay system to enjoy legitimacy and acceptance (both are required for effectiveness), employees must see it as fair in terms of process and outcomes. Recent research suggests that even if outcomes are agreed to be fair, performance can be negatively affected if the process through which the outcomes are achieved is perceived as unfair.

Human psychological processes make differentiation among close co-workers extremely controversial...The "silver medal syndrome" based on a study of Olympic champions, shows that the most disappointed people are those who come in second in a competition, having hoped they would be first. (p.17)

These are just two ways in which pay for performance schemes misunderstand federal employees' motivation to perform their jobs well, and might actually lower overall performance. Bohnert and Eaton also ridicule the "carrot and stick" method that Administration officials have repeatedly used to justify both the imposition of pay for performance and the elimination of union rights. Professor Levinson of the Harvard Business School calls this the "great jackass fallacy" because of the image of the animal that most people imagine standing between the proverbial carrot and stick, and argues that it is a self-fulfilling prophesy in the context of personnel management. If people are treated as if they need the threat of a proverbial beating in order to perform, they'll act with the same enthusiasm and intelligence of the beast in question.

Uniqueness of Federal Government Creates Organizational Impediments to Successful Pay for Performance

The efficacy of pay for performance also has been shown to depend upon the type of organization imposing it. Federal agencies are particularly inappropriate venues for pay for performance, according to the researchers, because federal employees "serve many masters" including Congress, executive branch political appointees, career managers, and the public at large. Often there are competing objectives that will cause employees being rated for performance to confront – and be forced to choose among -- ambiguous or contradictory goals. Unlike a private sector firm where the objective of profit maximization is clear, in a federal agency there may be conflicting "political or programmatic differences" which make it virtually impossible for federal employees' performance to be measured objectively.

Does anyone believe that Michael Brown, the former head of the Federal Emergency Management Agency (FEMA) is the lone federal manager or political appointee who won his position on the basis of factors other than competence and experience and could be expected to do a poor job of: a) setting performance objectives for career employees, and b) appraising their performance relative to these objectives? The fundamental differences between the public and the private sectors are so often denied by proponents of pay for performance, yet evidence of politicization in federal agencies should remind everyone of how difficult it is for apolitical, career civil servants to perform in the public interest over the objections of those with political agendas who have been granted authority to run agencies.

Shifting Congressional Authority to the Executive Branch

The Working for America Act would also constitute a change in the balance of powers with regard to authority over the civil service. Currently, the Congress has the authority to decide the terms and conditions of federal employment. The federal pay systems are statutory pay systems. Congress decides whether and by how much federal pay will be adjusted, and Congress decides what criteria will be used to link base salaries to positions. It sets the differences between what the lowest and highest paid federal employees will earn. Under the Working for America Act, this authority would be shifted to the Executive Branch and located within OPM. OPM would assume virtually all authority over all aspects of federal pay and performance management, from “certifying” the agency pay systems that would replace statutory systems, to deciding whether to grant salary adjustments, to deciding the ratio between salaries at the top and the bottom of the federal pay scales. OPM would decide the role that federal unions could play in defending the interests of their members in the context of pay.

Combining the indefensible curtailment of collective bargaining rights with the complete elimination of the role of Congress in setting federal pay policies is a double silencing of federal employees with regard to the most important issues in their work lives. Today, federal employees can contact both their union and their representatives in Congress with their concerns over the pay system, and have good reason to expect that both will be able to hold an agency accountable for implementing a system that is transparently written into the law. Under the Working for America Act, neither Congress nor a union will have a role to play in making sure that the pay system operates fairly or equitably.

Conclusion

No one finds fault with the concept of pay for performance. Yet real-world implementation is notoriously difficult and highly unlikely to produce the desired results. In fact, as the Harvard scholars have shown in their survey of empirical

research on implementation of pay for performance in the public sector, the danger is not only that pay for performance will fail to improve results, it is likely to make many things worse. The “conditions for success” for pay for performance identified by the research simply do not exist in the federal government, and they never will.

The authors of the Working for America Act have taken the current infatuation with pay for performance and used it as yet another opportunity to deny federal employees the right to union representation. By severely curtailing federal unions’ rights to represent their members, the Administration is effectively insulating itself from public accountability for how it spends appropriated funds, and whether it is adhering to the merit system principles for an apolitical civil service. As such, AFGE opposes the Working for America Act in the strongest possible terms and urges the Congress to reject it in its entirety.

That concludes my statement. I will be happy to answer any questions you may have.